Ng Soo Lay v Development & Commercial Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-527 OF 1995
NH CHAN, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
25 FEBRUARY 1997

Civil Procedure *— Default judgment — Setting aside — Application for — Claim against appellant as guarantor for default in payment — Whether there was merit in appellant's application — Whether judgment regularly obtained*

The appellant was guarantor on a guarantee for a facility granted by the respondent to Siong Export Industries Sdn Bhd ('Siong'). Siong had defaulted in payment and judgment in default had been taken against the appellant. The learned senior assistant registrar subsequently dismissed the application to set aside the judgment in default. The High Court judge at the appeal stage found that the judgment in default was regularly obtained and consequently it was mandatory for the appellant to file an affidavit on the merits. The appellant appealed against the dismissal of the application.

In support of the relevant application, the appellant said that the overdraft facility was only for seven months and had been settled by Siong. However, on Siong's application, the terms of repayment were restructured. The appellant further submitted that she was only a guarantor and it was Siong which had defaulted in payment. On the other hand, counsel for the respondent pointed out that there had never been any complaint of wrongful debit.

Held, dismissing the appeal:

After a careful analysis of the letter of guarantee and the relevant accounts and correspondence, it was found that there was no merit to the appellant's contentions. Since the judgment in default was obtained regularly, the appeal was therefore dismissed (see p 204H–I).

[Bahasa Malaysia summary

Perayu merupakan penggerenti kemudahan yang diberikan oleh penentang kepada Siong Export Industries Sdn Bhd ('Siong'). Siong telah mengingkar dalam pembayaran dan penghakiman ingkar telah diambil terhadap perayu. Penolong kanan pendaftar yang arif telah seterusnya menolak permohonan untuk mengetepikan penghakiman ingkar. Di peringkat rayuan, hakim Mahkamah Tinggi mendapati bahawa penghakiman ingkar telah diperolehi mengikut aturan dan berikutnya adalah mandatori untuk perayu memfailkan suatu afidavit atas merit. Perayu merayu terhadap penolakan permohonan.

Sebagai menyokong permohonan tersebut, perayu mengatakan bahawa kemudahan overdraf hanyalah untuk selama tujuh bulan dan telah pun dijelaskan oleh Siong. Namun demikian, atas permohonan Siong, terma bayaran semula telah diatur semula. Perayu selanjutnya

menghujahkan bahawa ia hanyalah merupakan penggerenti dan Siong yang telah ingkar dalam pembayaran. Sebaliknya, peguam penentang menghujahkan bahawa tidak pernah terdapat sebarang aduan mengenai debit yang salah.

Diputuskan, menolak rayuan:

Selepas satu penganalisisan yang teliti ke atas surat gerenti dan akaun serta surat menyurat yang relevan, adalah didapati bahawa penghujahan perayu tidak mempunyai apa-apa merit. Oleh kerana penghakiman ingkar telah diperolehi mengikut aturan, dengan itu rayuan ditolak (lihat ms 204H–I).]

Notes

For cases on setting aside default judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1547–1555.

Case referred to

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)

Appeal from: Suit No D2–22–782 of 1993 (High Court, Kuala Lumpur)

Joseph Yeo (*HY Lee* with him) (*AJ Ariffin Yeo & Harpal*) for the appellant.

Low Kim Leng (*Soo Thien Ming & Shahrizat*) for the respondent.

Abdul Malek Ahmad JCA (delivering judgment of the court): Judgment in default had been taken against the appellant on 8 July 1994 and the learned senior assistant registrar on 14 April 1995 had dismissed the application to set aside the said judgment in default.

The claim against the appellant in the court below was as guarantor based on a guarantee for a facility granted by the respondent to Siong Export Industries Sdn Bhd ('Siong'). The High Court judge at the appeal stage found that the judgment in default was regularly obtained and consequently it was mandatory for the appellant to file an affidavit on the merits — see *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312.

In support of the relevant application, the appellant had raised a number of issues. One was that the overdraft facility was only for seven months and had been settled by Siong. However, on Siong's application, the terms of repayment were restructured. The appellant had only produced the monthly statements of account up to the end of May 1991 while the respondent had annexed all financial statements till the end of 1992 which were consistent with the claim made.

A Another issue was that the trust receipt facility was used for another purpose. However, the learned High Court judge held that Siong never disputed the facility and had used it all along with no objections.

Before us, En Joseph Yeo for the appellant submitted that the appellant was only a guarantor and it was Siong which had defaulted in payment. B The credit facility letter of offer dated the 12 December 1989 for RM1.6m stated a period of seven months from the date of drawdown. The joint and several letter of guarantee was dated 6 January 1990. The overdraft facility was reinstated on 8 July 1991 but subject to a limit of RM50,000 for a period of six months.

C Learned counsel had specifically referred to three clauses in the letter of guarantee. Clause 2 reads as follows:

> This guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum owing as aforesaid but shall be a continuing security and shall extend to cover any sum or sums of money which shall for time being constitute the balance due D from the customer to the bank upon any such account as hereinbefore mentioned.

Clause 7 states:

> The bank may at all times without prejudice to this guarantee and without discharging or in any way affecting our liability hereunder; and without E notice to any of us:
>
> (1) determine, vary or increase any credit to the customer;
>
> (2) grant to the customer or to any other person any time or indulgence;
>
> (3) renew any bills, notes or other negotiable securities;
>
> F (4) take any other securities or guarantees from the customer or any other person;
>
> (5) deal with exchange release modify or abstain from perfecting or enforcing any securities or other guarantees or rights which the bank may now or hereafter have from or against the customer or any other person;
>
> (6) compound with the customer or with any other person or guarantor.

G At p 3 of the letter of guarantee, cl 16 provides:

> No one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or any dealing between the customer and the bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the H customer and the bank for the making of advances or otherwise giving credit or affording banking facilities to the customer by the bank.
>
> In order to give full effect to the provisions of this guarantee each of us hereby waives all rights inconsistent with such provisions and which we might otherwise as sureties be entitled to claim and enforce and we declare that the bank shall be at liberty to act as though we or each of us were I principal debtors or principal debtor to the bank for all payments guaranteed by us as aforesaid to the bank.

The appellant also referred to para 17 of her affidavit where she had averred as follows:

> I further state that from the statements of accounts in the records of the borrower, the plaintiff had made numerous unauthorized transfers of funds out of the borrower's current account No 20002–0074134 in excess of RM100m. In January 1991 alone, the plaintiff made the following unauthorized transfers:

(a)	3 January 1991	RM	920,002.00
(b)	4 January 1991	RM	223,708.00
(c)	4 January 1991	RM	545,126.92
(d)	9 January 1991	RM	549,038.33
(e)	17 January 1991	RM	1,232,204.58
(f)	23 January 1991	RM	226,301.79
(g)	24 January 1991	RM	255,109.71
(h)	28 January 1991	RM	509,456.61
(i)	29 January 1991	RM	271,565.78
(j)	30 January 1991	RM	2,944,477.44
		RM	7,676,991.16

Learned counsel for the respondent pointed out that the transfer of funds had never been objected to by the appellant earlier referring to Siong's letters on various dates from pp 187–200 in the appeal record. There had never been, he added, any complaint of wrongful debit.

As for the restructuring of the credit facilities, learned counsel had referred to their letter dated 4 April 1990 where a monthly reduction of RM50,000 would commence in March 1990 and to be reviewed in June 1990. Another letter dated 25 August 1990 referred to a temporary overdraft of RM829,000 consequent to the respondent's refusal to grant to Siong the reinstatement of their credit limit to RM1,110,000. Then, of course, there is the letter dated 8 July 1991 reinstating the temporary overdraft facility pursuant to their letter of offer dated 12 December 1989 subject to a limit of RM50,000 only for a period of six months secured against the existing debenture and the joint and several guarantee of the directors including the appellant.

After a careful analysis of cll 2, 7 and 16 of the letter of guarantee and the relevant accounts and correspondence, we were of the unanimous view that there was no merit to the appellant's contentions and since the judgment in default was obtained regularly, we had no hesitation in dismissing the appeal with costs. We also ordered that the deposit is to go to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by David Lai